DATUK SERI PANGLIMA JOSEPH PAIRIN KITINGAN *a*

v.

DATUK YONG TECK LEE & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU *b*
SULEIMAN HASHIM J
[CIVIL SUIT NO: K22-77 OF 1996]
20 JUNE 1997

TORT: *Defamation - Libel and slander - Distinction - Whether criminal as well as tortious - Presumptions - Proof of damage and special damage - Defamation Act 1957, s. 5 - Definition of special damage* *c*

TORT: *Defamation - Slander - Special damage - Whether must be specifically pleaded - Whether omission to plead fatal to action - Whether slander actionable per se - Publication at time of holding office - Defamation Act 1957, s. 5* *d*

CIVIL PROCEDURE: *Pleadings - Whether parties bound by pleadings - Plaintiff's statement of claim - Whether can be improved, amended or expanded*

e

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19 - Power to strike out - When and how to be exercised - Whether cause of action disclosed*

This was an application by the 1st defendant under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('the RHC') that the plaintiff's suit against the 1st defendant be dismissed with costs. *f*

The plaintiff had brought a suit against the defendants claiming general damages and an injunction for alleged defamation contained in two speeches and one press statement made by the 1st defendant concerning the plaintiff and his conduct as the then Chief Minister of Sabah. These speeches and press statement were published by the 2nd and 3rd defendants in the *Daily Express* on three separate occasions in three separate articles entitled "Yong: Previous Govt's Acts Make Changes To Laws Necessary"; "57,000ha Given Free!" and "Yong Says Again: 57,000ha Given Free" respectively. *g*

In this application, the 1st defendant submitted that the plaintiff had failed to allege special damage in the pleadings, thereby lacking an element of cause of action for slander. Also, s. 5 of the Defamation Act 1957 ('the Act') did not apply to the facts of the instant case. *h*

i

Held:

[1] The difference between libel and slander is important. Two main consequences follow from such a distinction. The publication of a libel is a crime as well as a tort, whereas slander is a tort only. In the case of a libel, the law presumes that the publication has caused damage to the plaintiff, and it is not necessary for the plaintiff to prove that he has suffered damage in order to establish a cause of action. In the case of a slander, however, the plaintiff has to prove that he has suffered special damage or that he is exempted from proving special damage by reason of the provisions of s. 5 of the Act.

[2] Special damage for the purpose of the law of defamation may be defined as any material or temporal loss which is either a pecuniary loss or is capable of being estimated in money.

[3] The plaintiff's action, insofar as the 1st defendant was concerned, took the form of slander, and insofar as the 2nd and 3rd defendants were concerned, took the form of libel. In the present case, there was no averment at all by the plaintiff for special damage against the 1st defendant. In an action for slander in which special damage is the gist of the action, the omission to plead special damage is fatal and the action will be dismissed.

[4] For slander to be actionable per se pursuant to s. 5 of the Act, it must be shown that the words reflect on the plaintiff in his office and that it was published at a time when he held that office. Here, the publication of the words complained of was made after the resignation of the plaintiff as the Chief Minister of Sabah. Hence, s. 5 of the Act did not apply.

[5] In any event, the plaintiff did not allege in the statement of claim that his ground of action was under s. 5 of the Act, nor did he allege an imputation of the commission of a crime which could be punished corporally nor was there any allegation of a police report lodged against the 1st defendant in relation to the possible offence punishable with imprisonment under the Penal Code or any statute.

[6] The parties were bound by their pleadings and the plaintiff's complaint that the 1st defendant had made disparaging, defamatory remarks against the plaintiff in the office of the Chief Minister of Sabah was contained in paras 15, 18 and 21(a) of the plaintiff's statement of claim. The said paragraphs could not now by submission by counsel for the plaintiff, be improved, amended or expanded to include or encompass the plaintiff's profession as a politician, a lawyer and the President of Parti Bersatu Sabah.

[7] The plaintiff had also failed to show how or in what manner the 1st defendant was responsible for the publication by the 2nd and 3rd defendants.

[8] The summary power under O. 18 r. 19 of the RHC to strike out a writ or a statement of claim or a defence disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases. On the evidence adduced, the plaintiff's statement of claim did not disclose any reasonable cause of action or some cause of action or raise any or some question which should go to trial.

[Application allowed.]

Cases referred to:
Bull v. Vazquez & Anor [1947] 1 All ER 334 ***(cit)***
C Sivanathan v. Abdullah Abdul Rahman [1984] 1 MLJ 62 ***(cit)***
Davey v. Botinck [1893] 1 QB 185 ***(cit)***
JB Jeyaretnam v. Goh Chok Tong [1987] 1 MLJ 176 ***(refd)***
Moore v. Lawson [1915] 31 TLR 418 ***(cit)***
Raja Zainal Abidin Raja Hj Tachik & 2 Ors v. Raza Sendirian Bhd [1993] 2 SCR 650 ***(refd)***
Ward v. Lewis & Ors [1955] 1 All ER 55 ***(refd)***
Workers' Party v. Tan Boon Too [1975] 1 MLJ 47 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 5
Rules of the High Court 1980, O. 18 r. 19(1)
Defamation Act 1952 [UK], s. 2

Other sources referred to:
Defamation, Duncan & Neill, 2nd edn, paras 3.05, p 7
Precedents of Pleadings, Bullen & Leake & Jacob, 12th edn, p 634
The Concise Law Dictionary, Osborn, 4th edn, pp 202, 313
The Supreme Court Practice 1988, vol 1, p 315

For the plaintiff - Yunof Maringking; M/s Maringking & Co
For the 1st defendant - Simon Shim (Nelson Shim with him); M/s Shim Pang & Co

Reported by Ling Hea Hoon

JUDGMENT

Suleiman Hashim J:

This is first defendant's application under O. 18 r. 19(1)(a) Rules of the High Court 1980 that plaintiff's suit against first defendant be dismissed with costs, dated 31 December 1996.

Plaintiff's suit against first defendant is for alleged defamation in respect of two speeches and one press statement made by first defendant as averred in plaintiff's statement of claim dated 12 August 1996:

(1) 15. In the 10th March 1996 issue of the Daily Express, the 2nd and 3rd Defendants falsely and maliciously published an article entitled **'Yong: Previous govt's acts make changes to laws necessary'** which contains a statement referring to and/or concerning the Plaintiff and/or his conduct as the then Chief Minister made on the 9th March 1996 by the 1st Defendant while opening the SAPP Constituency Committee office for Petagas.

(2) 18. In the 24th June 1996 issue of the Daily Express the 2nd and 3rd Defendants further published or caused to be published falsely and maliciously a defamatory article entitled: **'57,000 ha given free!'** (hereinafter referred to as **'the second article'**) which contains a speech made by the 1st Defendant when opening a Strategic Planning Workshop organised by the Parti Demokratik Sabah (PDS) another component part of the BN, on 23rd June 1996.

(3) 21. In the 4th July 1996 issue of the Daily Express, the 2nd Defendant and the 3rd Defendant once again falsely and maliciously published or caused to be published an article entitled **'Yong says again: 57,000 ha given free'** (hereinafter referred to as the third article) which contains defamatory statement made in a press conference by the 1st Defendant in the following words and/or passages:

And in respect of the two speeches and one press conference by first defendant, plaintiff complains as averred in the statement of claim:

(1) 16. The article complained of in paragraph 15 (hereinafter referred to as **'the first article'**) contains defamatory and false and malicious words and/or passages referring to and/or concerning the Plaintiff and/or his conduct as the then Chief Minister of Sabah as follows:

(a) Parcels of land within urban centres would be auctioned off instead of issued to private individuals or firms as was practised by the previous Government.

(b) He also cited examples on how the previous State Government abused its excessive powers.

(c) He said one glaring case was granting 384 acres of urban land to a company registered in the British Virgin Islands for land premium amounting to only RM7 million.

(d) Yong said the pieces of land concerned was charged to a bank for RM108 million, which meant an immediate gain of over RM100 million for company.

(e) However, the actual worth of the land is well in the region of RM150 million, Yong said.

17. The words and/or passages complained of in paragraph 15 herein meant and were understood to mean in their natural and ordinary meaning or in that meaning in the context of the first article referred to in paragraphs 16(a) to 16(e) herein or any of them that the Plaintiff as the then Chief Minister:

a) administered the State of Sabah alone illegally like a leader of a criminal syndicate by abusing his lawful authorities and/or constitutional jurisdiction;

b) surreptitiously conspired to give away State land to foreign individuals or firms without any payment at all or with insufficient land premium paid by the recipients;

c) administered the various Government departments assigned to him without or beyond and/or exceeding the authorities legally and constitutionally vested in him;

d) gave his approval for land alienation and/or land premium assessment as he wished and in total disregard of existing laws to cheat the Sabah State Government by charging low premium;

e) having been vested by the Yang di-Pertua Negeri with the executive functions to administer or manage State natural resources acted illegally to administer the relevant departments to the detriment of the Statement Government of Sabah;

f) never followed or gave attention to procedures of land alienation and/or land premium evaluations;

g) determined and/or directed personally all operations and administrations of the Natural Resources Department without having regard to constitutional and/or existing lawful and departmental procedures;

h) corruptly authorised Government officers in the relevant departments to act in breach of lawful procedures and requirements to alienate and/or assess the premium of the said land at RM7 million only when in actual fact as asserted by the 1st Defendant the sum ought to have been RM150 million;

i) unlawfully authorised alienation of the said land and/or the calculation or fixing of the RM7 million premium for the said land with the intention to enable the company to whom the said land was alienated to make instant profit of RM100 million;

j) misappropriated the sum of RM143 million for himself and company by alienating the said land and charging premium of RM7 million only whereas according to valuation made by the 1st Defendant, the land actually worth RM150 million at the material time;

k) knew that at the time of alienation, the actual worth of the said land was RM150 million but unlawfully sold it for RM7 million;

l) abused his powers to alienate the said land for premium of RM7 million only to help the company to make an instant profit of RM100 million by charging it to the bank for RM108 million and without having to repay the loan.

(2) 19. The second article which was referring to and/or concerning the Plaintiff and/or his character and conduct as the then Chief Minister of Sabah contains the following defamatory and false and malicious words and/or passages:

(a) Chief Minister Datuk Yong Teck Lee today alleged that the Chief Minister of the former Parti Bersatu Sabah (PBS) State Government approved 57,000 hectares of State land to Sarawak company "for free".

(b) He said according to the records, the approval of the land was made in 1993 without the imposition of any premium.

(c) The giving of such a large piece of land for free to an outside company which did not have Bumiputera interests and participation is an abuse of power and such abuse can occur if power is concentrated on one person, he said.

(d) He also stated that the former Chief Minister, with the powers entrusted to him, approved 154 hectares near here for tourism development by a company registered in the British Virgin Islands. The land was sold for RM7 million but the company mortgaged it for RM115 million.

(e) He said the previous Government also gave approval to an Australian company to prospect for minerals in an area covering 1,000 square kilometres in Sabah's East Coast.

20. The words and/or passages in the second article complained of in paragraph 18 meant and were understood to mean in their natural and ordinary meaning or in that meaning in the context referred to in paragraph 19(a) to 19(e) or any of them that the Plaintiff as the then Chief Minister of Sabah:

a) corruptly abused his constitutional powers and legal authorities;

b) covertly and surreptitiously conspired with others to cheat the Sabah State Government by giving away 57,000 hectares of State land for free and without charges whatsoever;

c) acted in breach of trust by dishonestly alienating the 154 hectares of tourism land and fixed its premium at RM7 million only with the intention to help the company to make profit of RM108 million after charging the land for RM115 million;

d) unlawfully granted the prospecting licence for personal gain and to the detriment of the State of Sabah and/or Sabahans;

e) manipulated the premium of the said land for his own benefit or in order to help the company to make instant profit;

f) unlawfully prevented professional and/or normal method of land premium assessments by the relevant government departments or officers.

(3) As regards the "third article":

(a) Chief Minister Datuk Yong Teck Lee reiterated his allegation yesterday that the Chief Minister of the previous Parti Bersatu Sabah Government (Datuk Seri Joseph Pairin Kitingan gave 57,000 hectares of State land to a Sarawak company for free.

(b) He said the State Barisan Nasional Government is now compiling a booklet on the allegation.

(c) My earlier statement alleging that he approved the land to a Sarawak company for free was meant to inform the people that the approval was done by one man alone, Yong said

(d) He stressed in the press conference that the 57,000 ha was given for free and that no land title was given to the company concerned.

(e) He said the deal, which was in the form of an agreement, gave the company the right to operate the timber concession for 96 years with a 10 years' option.

22. The words and/or the passages complained of in the third article meant and were understood to mean in their natural and ordinary meaning or in that meaning in the context referred to in paragraph 21(a) to 21(e) or any of them that the Plaintiff as the then Chief Minister of Sabah:

(a) dishonestly alienated 57,000 hectares of State land for free and without having regard to the need of the State to develop financially or economically and/or dishonestly discriminated interest of Sabahans and especially Bumiputra Sabahans;

(b) abused his powers or authorities and agreed secretly to help a Sarawak based company by alienation of 57,000 hectares of State land in return of personal gain to the detriment of Sabahans and the State of Sabah;

(c) granted secretly and illegally the timber concession on forest reserve for free and/or without charging any royalties on timber produces taken therefrom;

(d) whilst exercising his constitutional and legal power and/or authorities had committed criminal breach of trust;

(e) secretly entered into an agreement to enable a Sarawak based company to operate the timber concession for 106 years without payment of anything and/or without any benefit to the State Government of Sabah.

And plaintiff added,

23. Further or in the alternative, the words and/or passages complained of in the first, second and third articles and/or any of them in the context they appeared as set out in paragraph 16(a) to 16(e) and/or paragraph 18(a) to 18(e) and/or paragraph 21(a) to 21(e) respectively by way of innuendo bore the meaning that the Plaintiff has been dishonest to the people of Sabah and/or those meaning pleaded in paragraphs 17, 19 and 22 or any of them.

And under "PARTICULARS" plaintiff averred:

The Plaintiff will rely on the particulars pleaded in paragraphs 17, 19 and 22 and the letters from members of the public entitled **'Make all approvals by CMs public'** published on page 4 in the 17th March 1996 and another one entitled **'Legal or criminal is not the issue'** published on page 5 of the 7th July 1996 issues of the Daily Express.

24. The Defendants and each of them knew or ought to have known that:

(a) the premium of the said land at the material time was properly calculated and fixed by the relevant authorities and was not RM150 million as alleged because its whole area was then covered by sea water and cost the company to whom it was alienated a big sum of money to do intensive earth reclamation works;

(b) whatever amount of loans secured by the said land were given by a bank based on the land value after reclamation and/or the development plan thereon duly approved;

(c) the loan obtained, if any, will be repaid together with interest thereon by the borrower and not an instant profit as portrayed by the Defendants;

(d) the giving of the 57,000 hectares for reafforestation development needs special incentive and a large land area in order to be viable and was duly granted in accordance with existing State laws;

(e) premium for the land licensed for the reafforestation could not be charged due to the fact that the land area was within a forest reserve;

(f) the 57,000 hectares of land could not be alienated but was legally licensed to the company to carry on reafforestation project;

(g) the licensee shall pay royalties in respect of all timbers produce taken therefrom, if any;

(h) the licensee would have to spend a big sum of money on the reafforestation land and wait for long gestation periods for the return of their risky investment.

25. Further the Defendants and each of them knew or ought to have known that:

(a) the large land area was necessary for prospecting but that the land area to be granted for actual mining would be determined by the Government later depending on the finding by the prospecting company;

(b) the prospecting licence did not amount to a grant of a land title or any benefit *per se* and therefore no premium in respect thereof was chargeable;

(c) revenue for the State Government in respect of the prospecting licence would be collected in the form of royalties on mineral found thereon, if any;

(d) the granting of prospecting licence was done lawfully and beneficial to enable the State Government of Sabah to gather information and find out mining potential in the area at the expense of the licensee;

(e) if the licensee ceases prospecting for whatever reason, the licence land would be returned without causing any loss to the State.

26. Despite the several and serious allegations made in the first, second and third articles the Defendants are yet to take the necessary steps to recover the so called losses or to stop the projects undertaken by the companies pursuant to the alleged abuse of power by the Plaintiff and instead the 1st Defendant is now compiling a booklet purporting to explain so called abuse of powers which is denied by the Plaintiff

27. By reason of the matters pleaded above, the Plaintiff has been gravely injured in his character, credit and reputation and has been brought in public scandal, odium, ridicule and contempt and as the result of which the Plaintiff suffered damage.

28. Unless restrained by this Honourable Court, the Defendants and each of them will continue and/or further publish or repeat publication of the first, the second and the third articles or similar publications complained of therein thereby inflicting further damage upon the Plaintiff.

"AND the plaintiff claims:

1. Damages together with interest thereon and costs;

2. An injunction restraining the 1st, 2nd and 3rd Defendants whether by themselves, their agents servants or otherwise howsoever from publishing or repeating publication of the said first, second and third articles and/or similar publication directly or indirectly referring to and/or concerning the Plaintiff including but not limited to his role and/or in connection with the exercise by him of his powers as the then Chief Minister of Sabah and/or as the President of PBS; and

3. Any further or other relief as the Honourable Court may grant.

Such is the averment by plaintiff first defendant now seeks to summarily dismiss with costs.

And I direct my mind to all the matters averred by plaintiff and bear in mind all the matters averred by plaintiff first defendant now seeks to summarily dismiss with costs.

First Defendant's Contention

As in paras. 2, 3, 4, 5, 6, 17 and 8 of counsel for first defendant's written submission dated 3 June 1997:

> 2. The Plaintiff's action, therefore insofar as the 1st Defendant is concerned, takes the form of slander and libel insofar as the 2nd and 3rd Defendants are concerned. Please see *JB Jeyaretnam v. Goh Chok Tong* [1987] 1 MLJ 176 where the Defendant made a statement during a press conference was sued for slander. In *Workers' Party v. Tay Boon Too* [1975] 1 MLJ 47, the Defendant was sued for slander for a speech he made during an election rally and the Attorney-General, representing the Department of Broadcasting was sued for libel.
>
> 3. The difference between libel and slander is important in the present case in that in an action for libel, it is actionable *per se* whereas for slander, it is actionable only on proof of special damage. That is to say that in a case of slander where the Plaintiff fails to prove special damage and provide particulars of loss, the Plaintiff's action will be dismissed as it discloses no reasonable cause of action. Please see pages 38 and 108 of *The Law of Defamation* – Keith R Evans and para 18.11 in Duncan & *Neill* on *Defamation.* If the Statement of Claim discloses no cause of action, the Defendant can have it struck out and the action dismissed under O. 18 r. 19(1)(a). Therefore, where words are actionable only on proof of special damage and special damage is either insufficient in law to sustain the action or not pleaded at all, it will become plain and obvious that the Statement of Claim is insufficient and therefore liable to be struck out. Please see *Gatley* – para 1090. In *J B Jeyaretnam v. Goh Chok Tong* [1987] 1 MLJ 176, the Court of Appeal commented that the Plaintiff's action could have been dismissed on the sole ground that the Plaintiff, not having alleged or proved special damage as regards his office of honour, namely, that of the Secretary-General of Workers' Party, had failed to establish that the words complained of were actionable without proof of special damage.
>
> 4. In the present case, the Court is only concerned with the application by the 1st Defendant to strike out the Plaintiff's claim for failing to provide special damage in the pleadings thereby lacking an element of cause of action of slander. However, the action against the 2nd and 3rd Defendants still maintains.

5. A thorough examination of the Plaintiff's Statement of Claim will reveal that no special damage or particulars of loss was pleaded. Therefore, it is plain and obvious that the Pleadings, insofar as the 1st Defendant is concerned, fail to disclose a reasonable cause of action. Hence, the 1st Defendant is entitled to ask this Honourable Court to have the Statement of Claim struck out.

6. The only paragraph that is relevant to damage is paragraph 27 of the Statement of Claim. It is submitted that the said paragraph contains a plea of general damage only. This is specially so when read with Prayer No. 1 in the Statement of Claim. It is trite law that where words complained of are actionable only on proof of special damage, such damage must be specifically alleged with full particulars otherwise the Statement of Claim will be struck out. There is no realistic way to improve the pleadings by amendment in this case. As leave to amend is not automatic, it must be shown a nexus between slander and special damage. Please see *Bullen & Leake and Jacob's Precedents of Pleadings* at pages 634 and 635 and *Ward v. Lewis and Others* [1955] 1 All ER 55.

7. However it is acknowledge that there is statutory exception to the above-mentioned rules. It is submitted that such statutory exception does not apply to the present case. Section 5 of the Defamation Act 1957 states:

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

In the present case, the 1st Defendant made verbal statements in relation to the Plaintiff's conduct as Chief Minister of Sabah namely: the Plaintiff in his position as Chief Minister of Sabah granted 384 acres of land to a group of companies having shareholders registered in the British Virgin Island for land premium of about RM7 million whereas the actual worth of the land was well in the region of RM150 million. The 1st Defendant also alleged that the Plaintiff in the exercise of his power as Chief Minister of Sabah, gave approval to an Australian company to prospect for minerals for an area of 1,000 sq. kilometers in the East Coast of Sabah. The Plaintiff voluntarily on his own accord resigned as Chief Minister of Sabah on 17th March 1994. The Court is invited to take judicial notice of what the Plaintiff said around the time of his resignation. The Plaintiff was reported in the issue of 18th March 1994 in Daily Express and Borneo Mail as saying that it was the most honourable thing to do under the circumstances to resign as his party no longer enjoyed the majority support of the Assemblymen and to allow the new government to do their best to improve relations with the Federal Government.

8. For a slander to be actionable *per se,* it must be shown that the words reflect on the Plaintiff in his office and that it was published at a time when he held that office. (Please see *Bull v. Vazquez and Another* [1947] 1 All ER 334). The publication of the words complained of was made after the resignation of the Plaintiff as Chief Minister of Sabah. Therefore, it is plain and obvious at the time of publication, the Plaintiff was no longer the Chief Minister of Sabah.

Accordingly, he did not hold the office of Chief Minister of Sabah at the time of the alleged publication. Hence, section 5 of the Defamation Act 1957 does not apply.

Thus I think first defendant's contention is two-fold:

(1) First defendant is not answerable, there being no reasonable cause of action or some cause of action even if for slander only against first defendant.

(2) The cause of action even if for slander only against first defendant must fail because,

(i) Plaintiff has not pleaded special damage.

(ii) Section 5 of the Defamation Act 1957 is not applicable.

Plaintiff's Contention

Counsel for plaintiff submitted:

With respect disagree with counsel for first defendant.

(1) The three defamatoy statements not only slander but libel, against first defendant also libel not merely slander. Concede all three occasions first defendant made the statements orally, not written, however first defendant knew it would be published in writing in permanent form, therefore libel, first defendant responsible for the publication in its permanent form, No. 6 plaintiff's List of Authorities, 'circumstances in which respondent is responsible for the publication,' in present case first defendant repeated the same allegation of abuse of power three times, the three occasions.

(2) Plaintiff's profession is a politician, also a lawyer, also President of Parti Bersatu Sabah, therefore s. 5 Defamation Act 1957 applicable.

(3) Words used by first defendant amount to allegation of criminal imputation against plaintiff, allegation that plaintiff during tenure of office as Chief Minister grossly abused his power necessitating five State laws to be amended, paras. 15, 16(a) to (e), 18 and 21 Statement of Claim.

(4) Also see *Gatley on Libel and Slander*, 8th Edn, p. 77, paras. 149 and 150 'General Principle'.

(5) Allegation of corruption against plaintiff, actionable *per se.*

Thus I think plaintiff's contention is also two-fold:

(1) First Defendant is answerable, there being reasonable cause of action or some cause of action not only for slander but also for libel against first defendant.

(2) Section 5 of the Defamation Act 1957 is applicable.

Difference Between Libel And Slander

And with respect as submitted by Counsel for first defendant, with respect with which I agree:

3. The difference between libel and slander is important in the present case ...

In Osborn, *The Concise Law Dictionary*, I have with me the Fourth Edn, a student's reference book, pp. 202, 313:

Libel. Defamation (q.v.) by means of writing, print, or some permanent form. It is a tort actionable without proof of special damage. It is a defence to an action for libel (1) that there was no publication and therefore no defamation; (2) that the words used were incapable of a defamatory meaning; (3) that the words used were true in substance and in fact (justification); (4) that the publication was privileged. Privilege may be absolute or qualified, and qualified privilege may be lost by proof of express or actual malice (q.v.).

Slander. Defamation (q.v.) by means of spoken words or gesture. It is a tort and not a crime and is not actionable without proof of special damage, except in four cases when the words are said to be actionable *per se*, ie,: (1) Imputing a crime punishable with imprisonment. (2) Imputing contagious venereal disease. (3) Disparaging a person in his office, profession, calling, trade or business, whether or not the words are spoken of him in the way of his office, etc. (Defamation Act 1952, s. 2). (4) Imputing unchastity to a woman (Slander of Women Act 1891). See **Libel**.

In Duncan and Neill on *Defamation*, Second Edn, paras. 3.05 (p. 7) and 18.11 (pp. 127, 128):

The consequences of the distinction between libel and slander.

3.05 There are two main consequences of the distinction between libel and slander

(a) The publication of a libel is a crime as well as a tort, whereas slander is a tort only. In practice, however, prosecutions for criminal libel are not frequently brought.

(b) In the case of a libel the law presumes that the publication has caused damage to the plaintiff, and it is not necessary for the plaintiff to prove that he has suffered damage in order to establish a cause of action. In the case of a slander, however, the plaintiff has to prove either

(i) that the words are actionable *per se* at common law or by reason of s. 1 of the Slander of Women Act 1891; or

(ii) that he has suffered special damage or that he is exempted from proving special damage by reason of the provisions of s. 2 of the Defamation Act 1952.

Accordingly, where the words complained of were published as a slander and not as a libel the plaintiff has to consider not only whether the words were defamatory but also whether in the circumstances the publication is actionable.

Special Damage

18.11 Special damage for the purpose of the law of defamation may be defined as any material or temporal loss which is either a pecuniary loss or is capable of being estimated in money. Thus, for example, a plaintiff is entitled in an action for defamation to recover as special damage any pecuniary loss suffered as a result of losing his employment or a contract because of the publication of the defamatory matter. Furthermore, special damage can include the loss not only of a specific contract or of any specific customers but also a general loss of business. Where, however, the plaintiff wishes to claim special damage he must give particulars of his loss in the pleadings and give discovery of any relevant documents. Special damage is not confined to business or similar loss but may include, for example, the loss of hospitality from friends, provided such loss is capable of being estimated in money.

Court Rulings

Whether first defendant is not answerable, there being no reasonable cause of action or some cause of action even if for slander only against first defendant (first defendant's contention) or whether first defendant is answerable, there being reasonable cause of action or some cause of action not only for slander but also for libel against first defendant (Plaintiff's contention)

With respect I agree with submission by Counsel for first defendant that in making the two speeches and one press statement first defendant was as were the defendants in the two cases, the first is a Singapore High Court case and the second is a Singapore Court of Appeal case:

(1) *Tay Boon Too in Workers' Party v. Tay Boon Too,* referred to by the Counsel, when Tay made a speech at "a public election rally", Singapore High Court.

(2) *Goh Chok Tong in JB Jeyaretnam v. Goh Chok Tong,* referred to by the Counsel, when Goh Chok Tong "held a conference with the media", Singapore Court of Appeal.

And the cause of action against Tay Boon Too and Goh Chok Tong was for slander only, not slander and/or libel.

In Tay's case Tay's speech was "contained in a radio broadcast and published by the Department of Broadcasting, Ministry of Culture" Singapore on the next day and the cause of action against the Department of Broadcasting in the person of the Attorney-General was libel and thus the submission by counsel for first defendant, with respect with which I agree:

> 2. The plaintiff's action, therefore insofar as the 1st defendant is concerned, takes the form of slander and libel insofar as the 2nd and 3rd defendants are concerned ...

Ruling No. 1

That first defendant if answerable is answerable for slander only, not for slander and/or libel.

Whether The Cause Of Action Even If For Slander Only Against First Defendant Must Fail (First Defendant's Contention)

Counsel for first defendant says it must because:

> (1) 3. ... in an action for libel, it is actionable *per se* whereas for slander, it is actionable only on proof of special damage. That is to say that in a case for slander where the plaintiff fails to prove special damage and provide particulars of loss, the plaintiff's action will be dismissed as it discloses no reasonable cause of action. Please see pp. 38 and 108 of *The Law of Defamation* – Keith R Evans and para 18.11 in Duncan & Neill on *Defamation*. If the statement of claim discloses no cause of action, the defendant can have it struck out and the action dismissed under O. 18 r. 19(1)(a). Therefore, where words are actionable only on proof of special damage and special damage is either insufficient in law to sustain the action or not pleaded at all, it will become plain and obvious that the statement of claim is insufficient and therefore liable to be struck out. Please see *Gatley* – para. 1090.

(2) 5. A thorough examination of the plaintiff's Statement of Claim will reveal that no special damage or particulars of loss was pleaded. Therefore, it is plain and obvious that the Pleadings, insofar as the 1st defendant is concerned, fail to disclose a reasonable cause of action. Hence, the 1st defendant is entitled to ask this Honourable Court to have the Statement of Claim struck out

6. The only paragraph that is relevant to damage is para. 27 of the Statement of Claim. It is submitted that the said paragraph contains a plea of general damage only. This is specially so when read with Prayer No. 1 in the Statement of Claim. It is trite law that where words complained of are actionable only on proof of special damage, such damage must be specifically alleged with full particulars otherwise the Statement of Claim will be struck out. There is no realistic way to improve the pleadings by amendment in this case. As leave to amend is not automatic, it must be shown a nexus between slander and special damage. Please see *Bullen & Leake and Jacob's Precedents of Pleadings* at pp. 634 and 635 and *Ward v. Lewis and Others* [1955] 1 All ER 55.

In the present case there is no averment at all by plaintiff for special damage and in *The Supreme Court Practice* 1988, Vol. 1, p. 315, under "No reasonable cause of action or defence – principles applicable":

> So in an action for slander in which special damage is the gist of the action, the omission to plead special damage is fatal as the action will be dismissed (*Ward v. Lewis* [1955] 1 WLR 9, [1955] 1 All ER 55 CA).

Ruling No. 2

The cause of action even if for slander only against first defendant must fail.

Whether S. 5 Of The Defamation Act 1957 Is Applicable

Counsel for first defendant says it does not and submitted:

7. However it is acknowledged that there is statutory exception to the above-mentioned rules. It is submitted that such statutory exception does not apply to the present case. Section 5 of the Defamation Act, 1957 states:

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

In the present case, the 1st defendant made verbal statements in relation to the plaintiff's conduct as Chief Minister of Sabah namely: the plaintiff in his position as Chief Minister of Sabah granted 384 acres of land to a group of companies having shareholders registered in the British Virgin Island for land premium of about RM7 million whereas the actual worth of the land was well in the region of RM150 million. The 1st defendant also alleged that the plaintiff, when he was the Chief Minister of Sabah approved 57,000 hectares of State land to a Sarawak company for free. The 1st defendant also alleged that the plaintiff in the exercise of his power as Chief Minister of Sabah, gave approval to an Australian company to prospect for minerals for an area of 1,000 sq. kilometers in the East Coast of Sabah. The plaintiff voluntarily on his own accord resigned as Chief Minister of Sabah on 17 March 1994. The court is invited to take judicial notice of what the plaintiff said around the time of his resignation. The plaintiff was reported in the issue of 18 March 1994 in Daily Express and Borneo Mail as saying that it was the most honourable thing to do under the circumstances to resign as his party no longer enjoyed the majority support of the Assemblymen and to allow the new government to do their best to improve relations with the Federal Government.

8. For a slander to be actionable *per se*, it must be shown that the words reflect on the plaintiff in his office and that it was published at a time when he held that office. (Please see *Bull v. Vazquez and Another* [1947] 1 All ER 334). The publication of the words complained of was made after the resignation of the plaintiff as Chief Minister of Sabah. Therefore, it is plain and obvious at the time of publication, the plaintiff was no longer the Chief Minister of Sabah. Accordingly, he did not hold the office of the Chief Minister of Sabah at the time of the alleged publication. Hence, s. 5 of the Defamation Act 1957 does not apply. In any event, the plaintiff did not allege in the Statement of Claim, as he is required to do so, his ground of action is under s. 5 of the Defamation Act, nor did he allege an imputation of the commission of a crime which could be punished corporally nor was there any allegation of a police report lodged against the 1st defendant in relation of possible offence punishable with imprisonment under the Penal Code or any Statute. Please see *C. Sivanathan v. Abdullah b. Dato Hj. Abdul Rahman* [1984] 1 MLJ 62 and *JB Jeyaretnam v. Goh Chok Tong* [1987] 1 MLJ 176. As such, the slander complained of cannot be actionable *per se* without proof of special damage and since special damage is not established, the plaintiff has failed to disclose a reasonable cause of action against the 1st defendant. Please see *Workers' Party v. Tay Boon Too, Workers' Party v. Attorney-General* [1975] 1 MLJ 47, *C.*

Sivanathan v. Abdullah bin Dato Hj Abdul Rahman [1984] 1 MLJ 62 and *JB Jeyaretnam v. Goh Chok Tong (supra)*. Furthermore, the words uttered by the 1st defendant alleging abuse of power by the plaintiff did not impute to the plaintiff the kind or quality of misconduct which have rendered the words actionable without proof of special damage. In the context of this case, it is doubtful that straight-thinking men in the street reading those words would have formed the impression that the 1st defendant was wanting the plaintiff to be sent to jail for his abuse of power.

Counsel for plaintiff says it was and submitted:

Plaintiff's profession as a politician, also a lawyer, also President of Parti Bersatu Sabah, therefore s. 5, Defamation Act 1957 applicable.

It is not in dispute that plaintiff resigned as Chief Minister Sabah on 17 March 1994 and the three matters now complained by plaintiff are the speeches and press statement by first defendant well after plaintiff's resignation, on 9 March 1996, 23 June 1996 and in early July 1996.

Perhaps not insignificant is plaintiff's averment, in respect of all three instances:

(1) paragraph 15 of Statement of Claim, "... referring to and/or concerning the plaintiff and/or his conduct as the then Chief Minister ..."

(2) paragraph 18 of Statement of Claim, "... referring to and/or concerning the plaintiff and/or his character and conduct as the then Chief Minister ..."

(3) paragraph 21(a) of Statement of Claim, "... that the Chief Minister of the previous Parti Bersatu Sabah Government (Datuk Seri Joseph Pairin Kitingan) ..."

Thus plaintiff's complaint against first defendant is that first defendant was making disparaging, defamatory remarks against plaintiff in the office of Chief Minister Sabah, ie, "in the way of his office" as Chief Minister Sabah.

With respect parties are bound by parties' pleadings and with respect paras 15, 18, 21(a) of plaintiff's Statement of Claim cannot now by submission by counsel for plaintiff, by address by counsel for plaintiff from the Bar, be improved, be amended, be expanded to include or encompass "Plaintiff's profession as a politician, also a lawyer, also President of Parti Bersatu Sabah" if that is an attempt to support the submission "therefore s. 5, Defamation Act 1957 applicable.

A *fortiori:*

(1) in *Jeyaretnam v. Goh Chok Tong* [1987] 1 MLJ 176 Singapore CA, 'Accordingly, in our judgment Thean J was correct in concluding that this action could have been dismissed on the sole ground that the plaintiff, not having alleged or proved special damage as regards his office of honour, namely, that of the Secretary-General of WP, had failed to establish that the words complained of were actionable without proof of special damage ...

(2) in Bullen and Leake and Jacob's *Precedents of Pleadings*, 12th Edn, p. 634 under "(b) Slander Pleading" p. 634, "Where the ground of action is under s. 2 of the Defamation Act 1952, it should appear upon the Statement of Claim that the words were calculated to disparage the plaintiff in the office, profession, calling, trade or business held or carried on by him at the time of publication.

Section 2 of the English Defamation Act 1952 is similar with s. 5 of our Defamation Act 1957.

Plaintiff has not "alleged or proved special damage as regards his office of honour ..." namely, that of Chief Minister, Sabah, "to establish that the words complained of were actionable without proof of special damage" also at the time of the publication plaintiff was not in the office of Chief Minister, Sabah (*Jayaretnam's* case and *Bullen* and *Leake* above).

Ruling No. 3

The cause of action even if for slander only against first defendant must fail and s. 5 of the Defamation Act 1957 is not applicable.

Whether "First Defendant Knew It Would Be Published In Writing In Permanent Form, Therefore Libel, First Defendant Responsible For The Publication In Its Permanent Form, No. 6 Plaintiff's List Of Authorities, 'Circumstances In Which Respondent Is Responsible For The Publication,' In Present Case First Defendant Responsible For The Publication, First Defendant Repeated The Same Allegation Of Abuse Of Power Three Times, The Three Occasions".

This is part of counsel for plaintiff's submission and counsel for plaintiff rely on Duncan and Neill on *Defamation,* 2nd Edn, Chapter 5, p. 21, under "The ingredients of a *prima facie* case", para. 5.01(c):

5.01 In order to establish a *prima facie* case in an action for libel or slander it is necessary for the plaintiff to prove

(a) that the words complained of were published of him;

(b) that the words were defamatory of him; and

(c) that the words were published by the defendant or in circumstances in which the defendant is responsible for the publication.[3]

[3] The words must impute conduct which amounts to a criminal offence punishable by death, or by imprisonment with or without the option of a fine. An allegation that the plaintiff has committed an act which is punishable by a fine only is not actionable *per se*; see *Hellwig v. Mitchell* [1910] 1 KB 609 at 614 per Bray J

Counsel for plaintiff has not stated how or in what manner "in circumstances in which defendant is responsible for the publication", ie, how or in what manner in circumstances first defendant is responsible for the publication by second and third defendants.

With respect I do not think the publication by second and third defendants was in circumstances in which first defendant was responsible for the publication, in any event a contention quite the contrary to *Tay Boon Too's* case.

Ruling No. 4

The answer to this issue is in the negative.

Reminder

With respect I remind myself as has been stated

(1) in a number of authorities that the summary power under O. 18 r. 19 to strike out a Writ or a Statement of Claim or a Defence disclosing no reasonable cause of action or defence, as the case may be, should be exercised only in plain and obvious cases, that "so long as the statement of claim or the particulars (*Davey v. Botinck* [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and is not likely to succeed, is no ground for striking it out (*Moore v. Lawson* [1915] 31 TLR 418, CA)" and subsequent authorities.

(2) in *Raja Zainal Abidin bin Raja Haji Tachik & 2 Ors. v. Raza Sendirian Berhad* [1993] 2 SCR 650 SC where:

Held:

(5) In an application under O. 18 r. 19, it is incumbent of the court to examine the evidence and decide whether the action was bound to fail. The High Court always had an inherent jurisdiction to prevent abuse of its process irrespective of whether it was expressly called for or not in an application under O. 18 r. 19 unless such application was limited solely to the ground that any pleading did not disclose a reasonable cause of action or defence as the case may be.

(6) For any court to dismiss an action summarily under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

Conclusion

With respect I find plaintiff's Statement of Claim does not disclose any reasonable cause of action or some cause of action or raise any or some question which should go to trial.

Judgment

First defendant's application under O. 18 r. 19(1)(a) Rules of High Court 1980 that plaintiff's suit against first defendant be dismissed with costs, dated 31 December 1996 is allowed.

Plaintiff's suit against first defendant is struck out, dismissed with costs.